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Government Affairs Director

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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September 7, 2001

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, SW - Room TWB-204
Washington, DC 20554

Re: *Ex Parte* - CC Docket No. 01-138
Application by Verizon of Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Pennsylvania

Dear Ms. Salas:

I am writing to respond to certain questions that were raised in my meeting on September 4, 2001 with Dorothy Attwood of the Common Carrier Bureau concerning the performance assurance plan ("PAP") applicable to Verizon Pennsylvania Inc, and, specifically, whether VZ-PA has acceded to the adoption of the New York PAP in Pennsylvania. As explained below, VZ-PA has not accepted the adoption of the current New York PAP, and, notwithstanding its prior commitment to the Pennsylvania Public Utility Commission, is actively resisting the adoption of that plan in proceedings now pending before the PaPUC.

A brief history of the Pennsylvania PAP helps put this matter in context. The PaPUC initially approved a PAP for Verizon in an order entered December 31, 1999. However, additional litigation concerning the plan resulted from Verizon's failure to properly reflect that order in its subsequent "compliance filings," and the current PAP thus was finally approved by the Commission in an order entered on November 14, 2000. Less than six months later, the PaPUC issued yet another order in which, as a condition to its agreement to eliminate the requirement that VZ-PA structurally separate its retail and wholesale operations, the Commission required Verizon to agree to a modest increase in penalties and convened a new proceeding "to determine whether any further adjustment of these performance penalties may be

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necessary.”¹ Finally, in a June 6, 2001 letter to VZ-PA’s General Counsel, as condition to the PaPUC recommending the approval the instant application, the PaPUC, in order “to implement a PAP that is adequate for section 271 purposes,” required Verizon to agree that, in the proceeding established in its April 11, 2001 order, “there will be a rebuttable presumption that the features of the NY remedies plan should be made applicable and tailored to Pennsylvania.”²

Verizon purported to accept that condition that same day, but as subsequent litigation has now made clear, Verizon accepted only the “rebuttable presumption,” not the New York PAP. Indeed, in the ongoing PaPUC review of Verizon’s plan, Verizon has submitted two entirely new proposals that diverge substantially from the current New York plan.³

Verizon’s primary proposal, which it has dubbed the “New PA PAP,” is a plan that Verizon’s own witnesses admitted on cross-examination is not in effect anywhere in the country, much less in any state in the Verizon footprint. That proposal omits entirely certain key provisions that exist in the current New York PAP, including the change control assurance plan and incentives for accurate metrics reporting. At the same time, Verizon has inserted several provisions in this “new” plan, such as factors that are aimed at providing additional mitigation for Verizon’s discriminatory performance, that do not exist in the New York PAP, and that in fact the PaPUC effectively had rejected in its adoption of the current Pennsylvania PAP. Moreover, Verizon’s “new” proposal contains many of the same serious structural defects that the Department of Justice criticized in the existing Pennsylvania PAP, such as the fact that the plan applies the same remedy for all metrics, and thus does “not reflect the relative importance of particular metrics,” and the fact that the plan does not give the PUC flexibility to shift potential payments to target severely deficient performance.⁴

¹ *Re: Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, Opinion and Order, PaPUC Docket No. M-00001353, entered Apr. 11, 2001, at 39.

² Letter of June 6, 2001 from James J. McNulty, Secretary, PaPUC, to Julia A. Conover, Esq., *Re: Consultative Report on Application of Verizon Pennsylvania, Inc. for FCC Authorization to Provide InterLATA Service in Pennsylvania*, PaPUC Docket No. M-00001435, at 3-4.

³ See Letter of July 25, 2001 from William B. Petersen, Esq. to James J. McNulty, Secretary, PaPUC, *Re: Performance Measures Remedies*, PaPUC Docket No. M-00011468, at 1. That letter, which served as the cover sheet for Verizon’s two submissions in the state proceeding, is attached.

⁴ Evaluation of the U.S. Department of Justice, CC Docket 01-138, July 26, 2001, at 14-17.

Verizon's second proposal -- essentially its fallback position in the state litigation -- purports to be a version of the New York PAP, but, as even a cursory review makes clear, it is a version that eliminates or dilutes critical components in the current New York Plan -- provisions that also exist in the Massachusetts PAP reviewed by this Commission in its decision approving Verizon's Section 271 application in that state.⁵ These changes, which have not been approved by the New York PSC, include the following:

- The complete elimination of the special provisions in the current New York plan applicable to flow through of unbundled network element orders (or, failing that, a delay of up to eighteen months in the effective implementation of those measures). The application of these special provisions in New York has provided Verizon with the incentive to bring its order flow-through performance there to a level that is well above that currently experienced by CLECs in Pennsylvania.
- Gutting the New York PAP's scoring system for non-parity performance by eliminating the intermediate (i.e., "-1") tier, thus automatically giving Verizon a "pass" for performance that under the current New York plan would be considered a failure.⁶
- Reducing the "Dollars At Risk" cap of 39 percent of Net Return that currently is applicable in New York -- and that is applicable in the Massachusetts PAP reviewed by this Commission⁷ -- to 36 percent.
- Eliminating the requirement for an annual independent audit of PAP reporting and data.

⁵ *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, CC Docket No. 01-9, Apr. 16, 2001, ¶¶240-48 ("Massachusetts 271 Order").

⁶ This same defect also plagues Verizon's current Pennsylvania PAP and its primary "new" proposal in the state litigation.

⁷ Massachusetts 271 Order, ¶241 and n.769 (noting that the dollars "at risk" under the Massachusetts plan "represents 39 percent of Verizon's Net Return.").

- Eliminating provisions that coordinate the PAP with performance incentive provisions in negotiated interconnection agreements between Verizon and CLECs.
- Crafting new provisions that would permit Verizon to offset incentive payments due under the PAP against amounts owed by the CLEC to Verizon for wholesale services, apparently even when the CLEC disputes that balance. This provision is especially troubling given Verizon's documented and on-going inability to tender fully accurate and reliable wholesale electronic bills in Pennsylvania.⁸

Verizon's proposals are now pending in the litigation before the Pennsylvania PUC. It should be clear, however, that this matter will not be resolved quickly, and certainly not before this Commission's statutory deadline for resolving the instant application.⁹ The PUC's current deadline for its Administrative Law Judge's recommended decision is September 30, 2001. Given the exceptions process and period for Commission review that normally follows the issuance of such a decision, it is likely that the final PaPUC order will not be issued until late November, at the earliest.

Even an order by the PaPUC at that time following through with its presumption and directing the adoption of the current New York PAP in Pennsylvania will not necessarily fully and finally resolve this matter. That is because Verizon has not repudiated its intent to challenge such a decision on appeal. As AT&T described in our initial comments in this matter (at 64), Verizon, in response to the PaPUC's June 6 letter, did withdraw its then pending appellate challenge to the current Pennsylvania PAP. However, it did so without prejudice, and thus Verizon has not affirmatively abandoned its fundamental claim in that appeal – specifically, that the PaPUC lacks the authority to establish a PAP. Instead, Verizon has simply – and temporarily – put that argument away for use in a

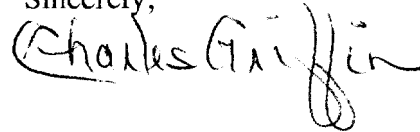
⁸ Verizon's version of the New York PAP deviates from the plan currently in effect in New York in other ways, such as by eliminating the procedures for state commission review of the reallocation of potential bill credits and by delaying the date for issuance of performance reports and credits. Indeed, it is not clear that the parties in the underlying state proceeding have been able to identify all of Verizon's modifications of the New York PAP because Verizon did not provide a redlined version of that document in its submissions and the schedule in the state proceeding did not provide for discovery.

⁹ Verizon in fact has included provisions in both of its submissions in the state docket that would only make those plans effective one month after final approval by this Commission of the instant application.

challenge to a future, presumably post-271 order of the PaPUC relating to the PAP, such as the final order in the pending state proceeding.¹⁰

In accordance with Section 1.1206(a)(1) of the Commission's rules, two copies of this Notice are being submitted to the Secretary of the Commission for inclusion in the public record for the above-captioned proceeding.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles Griffin". The signature is written in a cursive, flowing style with a large initial "C" and a long, sweeping underline.

cc: D. Attwood
J. Carlisle
S. Bergmann

¹⁰ The Department of Justice also raised this concern in its report. Evaluation of the U.S. Department of Justice, CC Docket 01-138, July 26, 2001, at 16 n.63.

July 25, 2001

Via UPS Overnight Express Mail

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Performance Measures Remedies, Docket No. M-00011468

Dear Mr. McNulty:

Pursuant to Judge Schnierle's Second Prehearing Order in the above-captioned case, Verizon Pennsylvania Inc. ("Verizon PA") has enclosed for filing an original and three copies of: (1) Verizon PA's proposed New Pennsylvania PAP ("New PA PAP"); (2) Verizon PA's proposed New York PAP Modified for Pennsylvania ("NY(pa) PAP").

As you are aware, in this proceeding, the Commission has established a rebuttable presumption that the New York PAP should be made applicable and tailored to Pennsylvania.¹ Verizon PA believes that its proposed New PA PAP is fairer to both Verizon and the CLECs, more accurate, and much easier to understand and administer than the New York PAP, for reasons that Verizon PA will set forth in its August 6, 2001 comments. Accordingly, the Commission should adopt the New PA PAP.

Given the Commission's rebuttable presumption (and the accompanying uncertainty as to whether the Commission will consider PAP plans that are not based on the New York PAP), Verizon PA has also provided the Commission with a modified version of the current New York PAP. This second document – the NY(pa) PAP – contains modifications to the current New York PAP that are absolutely essential to ensuring that this PAP is accurate and that it is fair to all interested parties. However, the NY(pa) PAP should be adopted only in the event that the Commission rejects the New PA PAP and any other proposals it receives that are not based on the New York PAP.

¹ See June 25, 2001 Consultative Report of the Pennsylvania Public Utility Commission at 267 ("there will be a rebuttable presumption that the features of the New York remedies plan should be made applicable and tailored to Pennsylvania.").

Verizon PA also intends to present Julie Canny and Marilyn DeVito as witnesses in this proceeding.

If you have any questions, please contact me.

Very truly yours,

William B. Petersen

WBP/meb

Enc.

cc: Via Email & UPS Overnight Express Mail
The Honorable Michael Schnierle
Gary Wagner
Louise Fink-Smith, Esquire
Attached Certificate of Service